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Nos. 78-1088 and 78-1217

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY A. KISSINGER, PETITIONER

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PETITIONERS

v.

HENRY A. KISSINGER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49a-50a)[1] is not reported. The opinion of the district court (Pet. App. 51a-58a) is reported at 442 F. Supp. 383.

[1] "Pet. App." refers to the appendix to the petition in No. 78-1088.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a-48a) was entered on November 7, 1978. The petition for a writ of certiorari in No. 78-1088 was filed on January 8, 1979, and the petition in No. 78-1217 was filed on February 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether documents that are not in the possession of an "agency" when a request for their production is filed under the Freedom of Information Act must be retrieved so that they can be processed by the agency for release (both petitions).

2. Whether transcripts of telephone conversations of a former Secretary of State are appropriate documents for retrieval, if such retrieval authority exists (No. 78-1088).

3. Whether review of the transcripts at issue in this case for possible disclosure would violate the constitutional expectation of privacy of petitioner Kissinger (No. 78-1088).

4. Whether the National Security Council is an "agency" and, if so, whether requests for documents created by the head of that agency must be presented to the NSC rather than to the Department of State (No. 78-1217).

STATEMENT

Petitioner Henry A. Kissinger served as National Security Adviser from January 20, 1968, until November 3, 1975. On September 22, 1973, he assumed the office of Secretary of State, which he held until January 1977 (Pet. App. 52a). Throughout that period, Kissinger's secretaries monitored his telephone conversations and prepared transcribed notes of those conversations. At both the White House and the State Department, the notes were

stored in Kissinger's office and kept separate from official agency files (Pet. App. 52a).

Before leaving office, Kissinger decided to donate to the United States some of his papers, including the transcribed notes of his telephone conversations. The State Department's Legal Adviser concluded that the notes were not State Department documents, but rather were Kissinger's personal papers. Late in 1976 he removed the notes from the State Department and donated them to the Library of Congress. (Excerpts and summaries of the portions of the transcripts related to official business were retained by the State Department.) Under the terms of the deed, public access to the notes is to be restricted for 25 years or until five years after Kissinger's death, whichever comes later (Pet. App. 52a-53a).

After the notes had been removed from the State Department, several persons filed a series of Freedom of Information Act requests with the State Department, seeking to obtain copies of the notes prepared throughout the period that Kissinger served as National Security Adviser, as Secretary of State, and in both positions. The State Department denied the request.

The requesters[2] then filed this action in the United States District Court for the District of Columbia, seeking to have the notes returned to the State Department and disclosed to them under the Freedom of Information Act. The district court granted relief with respect to the notes Kissinger had prepared while serving at the State Department, but not with respect to those he had had prepared while serving at the White House (Pet. App. 59a-61a). The court ordered Kissinger, the Department of State, and the Librarian of Congress to transfer the notes from the Library of Congress to the custody of the State

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[2]We refer to the private respondents in No. 78-1088 and the petitioners in No. 78-1217 as the requesters.

Department. The State Department was ordered to determine which of the transcribed notes are required to be released under the Freedom of Information Act and to give Kissinger and other parties to his telephone conversations an opportunity to resist discretionary disclosure of any notes that are exempt from mandatory disclosure under the Act. Those notes determined to be subject to mandatory disclosure, the court held, must be released to the requesters.

The district court held that it was authorized to order the transfer of records to the Department of State as a consequence of its "broad equitable powers granted * * * in aid of [its] role as the 'enforcement arm' of the Freedom of Information Act" (Pet. App. 55a). Therefore, even though the Library of Congress is not subject to the Freedom of Information Act (see 5 U.S.C. 552(e)), the court held that it could order the return of the notes Kissinger had donated to the Library of Congress. The exercise of this power was appropriate in this case, the court held, because, in the court's view, the transcripts of the conversations held in the State Department are agency documents that Kissinger had wrongfully removed, and because it appeared unlikely that the Administrator of General Services would file an action seeking recovery of the documents under 44 U.S.C. 3106. The court further held that these notes had been prepared in the discharge of Kissinger's official duties and are therefore United States property, which should not have been removed from the State Department.

Both sides took appeals, and the court of appeals affirmed.[3] With respect to the notes of telephone conversations prepared while Kissinger was serving as

[3]This Court granted a stay of the district court's retrieval and processing order pending final disposition of the appeal. 435 U.S. 993 (1978). Retrieval has been further postponed pending this Court's disposition of the petitions for certiorari.

National Security Adviser, prior to his appointment as Secretary of State, the court of appeals held that the Freedom of Information Act does not extend to close Presidential advisers such as the National Security Adviser and that the relocation of those notes to the State Department did not, without more, render them State Department records obtainable by means of a Freedom of Information Act request to that Department[4] (Pet. App. 49a-50a). Without discussion, the court also affirmed the portions of the district court's order requiring that the notes prepared while petitioner was serving as Secretary of State be returned to the State Department and that those notes be disclosed to respondents in accordance with the provisions of the Freedom of Information Act (Pet. App. 49a).

DISCUSSION

1. The Freedom of Information Act requires agencies covered by the Act to make available agency records on request unless those records are exempt from mandatory disclosure. See 5 U.S.C. 552(a)(3) and 552(b). The Act further empowers district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant" (5 U.S.C. 552(a)(4)(B)). The important question raised by these two petitions is whether the Act requires production of records that have at some time been in the agency's possession, but are not in the agency's possession at the time that the FOIA request is made or the FOIA complaint filed in district court.

[4]The court also noted that respondents' speculation that the earlier transcripts might concern the affairs of the National Security Council adds nothing to their claims, because no Freedom of Information Act request was made of the National Security Council (Pet. App. 50a).

The transcribed notes of Kissinger's conversations were not in the custody or control of the State Department at the time the FOIA requests were made. The notes at issue in No. 78-1088 had been prepared at the State Department and then removed prior to the time the FOIA requests were filed with that agency. The notes at issue in No. 78-1217 were prepared elsewhere and had simply been kept at the State Department for a period of time before being removed, also prior to the time the FOIA requests were filed. The district court and the court of appeals nonetheless held that the FOIA authorized the court to order the return of the notes from the Library of Congress—which is not an "agency" for purposes of the Freedom of Information Act—on the ground that the notes had been wrongfully removed from the State Department.

It is well established that the FOIA does not require agencies to create records; it merely requires the production of records in the agency's possession. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975); *Renegotiation Board* v. *Grumman Aircraft* Engineering Corp., 421 U.S. 168, 192 (1975). Nothing in the FOIA requires an agency to keep any documents that it possesses. Because the Act applies only to existing records, it ordinarily does not authorize a court to order the return of records that are no longer in the possession of an agency. A Freedom of Information Act request entitles the requesting party to examine those agency records in the agency's possession at the time the request is made; it does not impose on the agency an obligation to retrieve records not in its possession. See (*Ciba-Geigy Corp.* v. *Mathews*, 428 F. Supp. 523, 531 (S.D.N.Y. 1977); *Nichols* v. *United States*, 325 F. Supp. 130, 137 (D. Kan. 1971), aff'd, 460 F. 2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972). As was stated in the Attorney General's contemporaneous memorandum explaining the provisions of the FOIA, the Act "refers * * * only to

records in being and in the possession or control of an agency. The requirement of this subsection imposes no obligation to compile or procure a record in response to a request." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23-24 (June 1967).

The district court relied on *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), as authority for its order directing the return of the notes to the Department of State. *Bannercraft*, however, does not support that order. Equitable authority to enforce the substantive provisions of the FOIA is quite different from authority to enlarge the Act's substantive reach. In *Bannercraft* the Court held that the provision of equitable jurisdiction in the FOIA authorizes a district court to grant injunctive relief where it is necessary to enforce the Act, even if the particular form of injunctive relief granted is not specifically authorized by the Act. This principle, we submit, would permit a court to order the return of agency records removed after the filing of an FOIA request for those records. An injunction could be appropriate in such a case because the act of removing records from the agency after an FOIA request is filed could constitute "withholding agency records" from the complainant, which is prohibited by the Act. See 5 U.S.C. 552(a)(4)(B). But the *Bannercraft* principle does not authorize an injunction ordering the retrieval of records that were not in the agency's possession at the time of the FOIA request, because the Act was not intended to reach such materials. Records that were removed from the agency before the FOIA request was filed are not being "improperly withheld from the complainant" within the meaning of the Act. A retrieval order therefore would not promote the purposes or policies of the FOIA, but rather would impose on the agency a new obligation, not found in the FOIA, to go beyond simply producing records that are in its possession.

Under the analysis we have set out, the district court and court of appeals were correct in holding that the Department of State need not retrieve the transcripts of Kissinger's White House conversations, and failed to articulate any theory that would justify their holding that the Department must retrieve the transcripts of the conversations held after Kissinger became Secretary of State. Absent exceptional circumstances, such documents should be treated alike because none was in the possession of an "agency" for FOIA purposes at the time a request for production under FOIA was received by the Department of State. Although there is an interesting difference in the status of the transcripts—those at stake in No. 78-1088 were created within the Department of State, while those at stake in No. 78-1217 were created outside a FOIA "agency"[5] and were present in the Department of State for only a few years before their removal—that difference is unimportant to the scope of the FOIA.

We agree with petitioners that the question whether the FOIA requires the processing and production of records that were not in the possession of an "agency" at the time of a request for production is of sufficient general

[5]Petitioners in No. 78-1217 apparently concede this point (Pet. 6-7), at least with respect to notes of Kissinger's White House conversations that do not pertain to his role as head of the National Security Council. They argue, however, that the NSC is an "agency" and that they are therefore entitled to the notes that "relate to the affairs of the NSC" (Pet. 11). The court of appeals, without deciding whether the NSC is an "agency" for purposes of the FOIA, held that the requesters' claim must fail because they did not present a request to the NSC. There is no need for the Court to review the requesters' challenge to this holding. The question whether the NSC is an "agency" apparently is being litigated here for the first time, and neither the district court nor the court of appeals addressed the question in detail. There is, moreover, a serious question whether notes that simply "relate to the affairs of the NSC" would be treated as "agency records" even if NSC is an agency. Kissinger was not simply the head of the NSC; he was the President's closest personal adviser on foreign affairs, and his own notes would not be "agency" documents no matter what the status of his subordinates' documents. And the question whether a request under the FOIA must be presented to the agency whose documents are sought not only has received little attention but also is not properly presented by this case. It would be one thing if NSC documents, in the possession of the State Department, were sought by a request to the State Department. It is quite another to say that a requester can seek NSC documents by request to the State Department where, as here, they are *not* in possession of the State Department. There will be time enough to consider the second question presented in No. 78-1217 if a request is made to an "agency" that, at the time of the request, actually has possession of agency records created by some other agency.

importance to warrant review by this Court. The question potentially affects the operations of every federal agency, and it will recur until this Court addresses it. Millions of documents pass in and out of the files of federal agencies daily. If agencies must retrieve and process every document that they create, or that they ever possessed, their duties under the FOIA will be substantially increased. Review is particularly appropriate here because the District of Columbia Circuit, which reviews substantial numbers of FOIA cases, has created an illogical distinction between documents created within an agency and documents that passed through an agency.[6]

2. Our argument to this point has assumed that the transcripts of Kissinger's conversations in the State Department were agency records at the time of their creation, and that the transcripts of Kissinger's conversations in the White House, although not agency records when created, became agency records when moved to the

[6]The question whether agencies must retrieve documents that were once in their possession is closely related to the question, which is presented in *Forsham* v. *Califano*, No. 78-1118, whether the FOIA requires agencies to obtain documents that were never in their possession. For the reasons stated in our response to the petition in No. 78-1118, we believe that the Court should grant review of that case and set it for argument in tandem with the present case. (We have furnished copies of our response in No. 78-1118 to counsel for petitioners in this case.)

State Department. We have argued that the transcripts are not disclosable under the FOIA even on this assumption, which the district court and the court of appeals shared. Petitioner Kissinger maintains, however, that this assumption is unwarranted, and that the transcripts never were agency records and were properly removed. Consequently, he argues, a district court cannot order retrieval of the transcripts even if it has the power to order the retrieval of agency records. We believe that this question is not sufficiently important to warrant review.

The Freedom of Information Act does not define the meaning of "records," and so the dispute in this case has centered about the Federal Records Act, 44 U.S.C. 3301 *et seq.* The definition of "records" in that Act includes "documentary materials, regardless of physical form or characteristics, made or received by an agency * * * in connection with the transaction of public business and preserved or appropriate for preservation by that agency * * * as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them" (44 U.S.C. 3301). It is undisputed that the notes at issue here include many conversations relating directly to the transaction of public business. Moreover, the notes were preserved in part to provide a record of the functions, policies, and decisions of the government. Accordingly, at least some of the transcribed notes of Kissinger's telephone conversations are federal records under the definition in 44 U.S.C. 3301.

Kissinger contends that even if the notes constituted agency records, they were not improperly removed from the State Department.[7] In our view, however, it is not

[7]The propriety of the disposal of agency records is governed by 44 U.S.C. 3301-3324, and the disposal procedures are overseen by the Administrator of General Services. See 44 U.S.C. 3303a.

necessary for this Court to determine whether the notes were improperly removed. That question is substantially tied to the facts of this case. Moreover, the inquiry is not relevant to the question whether the notes can be obtained by a requester under the Freedom of Information Act. If a particular record has been removed from an agency in violation of the Federal Records Act, the proper remedy is a retrieval action under the Records Act (see 44 U.S.C. 2905, 3106). A plaintiff in a FOIA suit gains no additional rights on account of an alleged violation of the Records Act, so long as the alleged violation of the Records Act has not also violated the requester's rights under the Freedom of Information Act. Because the notes at issue in this case were removed from the State Department before the present FOIA requests were filed, the removal of the notes did not violate respondents' rights under the FOIA, even if the removal was improper under the Federal Records Act.

3. Petitioner Kissinger further contends (78-1088 Pet. 24-27) that the district court's order violates his constitutional rights of privacy. Whatever the merits of the claim may be, it is premature. The district court's order provides that, after the notes are returned to the State Department, petitioner shall be given an opportunity to object to the release of any portions of the notes that are exempt from mandatory disclosure because they contain matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (see 5 U.S.C. 552(b)(6)). Accordingly, even if the district court's order is sustained, Kissinger will have a further opportunity to raise his constitutional objections to the release of any materials in which he has a significant privacy interest, if the Department decides to release any such materials at the conclusion of its review of the notes. The review process in itself does not violate any constitutional right of privacy, for the same reasons that the analogous review process was upheld in *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455-465 (1977).

CONCLUSION

The petitions for a writ of certiorari should be granted. The Court should limit the grant to the first question presented by each petition, and it should consolidate the cases. The cases should be set for argument in tandem with *Forsham* v. *Califano,* No. 78-1118.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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